IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1648
LOWER TRIBUNAL NO. 07-64

INQUIRY CONCERNING A
JUDGE NO. SC07-1648 RE: JUDGE
RALPH E. ERIKSSON

On Review of the Recommendations of the
Hearing Panel, Judicial Qualifications Commission

JUDGE RALPH E. ERIKSSON'S BRIEF IN OPPOSITION TO THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE HEARING PANEL, JUDICIAL QUALIFICATIONS COMMISSION

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STATEMENT OF THE CASE AND FACTS

The nature of the case is a Judicial Qualifications Commission proceeding whereby the hearing panel of the J.Q.C. found Judge Eriksson guilty of two charges. One charge (Count I) was that he improperly revoked a bond in a criminal case. The other charge (Count III) was that he misapplied the law while presiding over an injunction for protection docket.

In the lower tribunal there were two other charges, and the hearing panel made no finding of guilt as to those charges.

This case is now before the Florida Supreme Court because the hearing panel of the Judicial Qualifications Commission has filed with this Court their Findings, Conclusions and Recommendations and the clerk of the Florida Supreme Court has commanded Judge Ralph E. Eriksson to show cause why the recommended action of the J.Q.C. should not be granted.

The facts are not in dispute. In Count I Judge Eriksson revoked a bond when he believed a defendant who was unprepared for trial and had interrupted the orderly administration of justice.

In Count III Judge Eriksson believed that the way he was presiding over injunction for protection hearings adhered to the clear mandate of law that a judge be unbiased to the point of cold neutrality.

What is in dispute is whether the J.Q.C. has jurisdiction over a trial judge's ruling, and if so, has the legal standard of "clear and convincing evidence" been met when testimony presented before the hearing panel by judges and lawyers indicated that Judge Eriksson was well within the law or his discretion in making the rulings that he made.

The findings of fact made by the hearing panel are contrary to the law in that they violate the confidentiality provisions of the Florida Constitution, the Judicial Qualifications Commission rules, statutory and case law, and do not take into account the clear mandate of the Florida Supreme Court concerning family law cases.

Summary of Argument

I. The Judicial Qualifications Commission (J.Q.C.) exceeded its jurisdiction because the matters that they investigated were a judge's interpretation and ruling on the law, not a judge's conduct. In so doing the J.Q.C. is attempting to evaluate a judge's legal analysis and to overturn the doctrine of judicial independence.

II. The hearing panel erred, both procedurally and substantively, in admitting into evidence and considering matters and testimony that are precluded by the Florida Constitution, Judicial Qualifications Rules and the Florida

Statutes.

III. In Count I the evidence and law does not support the hearing panel's findings or conclusions, as it attempts to find that Judge Eriksson was motivated by ill will, when the evidence was not only the opposite but that his actions were proper and within his discretion.

IV. In Count III the evidence and law does not support the hearing panel's findings or conclusions. It attempts to overturn the doctrine of judicial independence by replacing procedural case law with procedural statutory law, and this can not be done because procedure is a matter to be determined by the court, not the legislature.

V. Reply to Comments and Discussion in the J.Q.C.'s Findings and Recommendations.

STANDARD OF REVIEW

The first standard of review is *de novo* review, because this matter is a question of legal rulings and interpretation of the law and as such the J.Q.C. has exceeded its jurisdiction and has no authority to inquire into the reasoning for a legal opinion.

As to factual matters the standard of review is clear and convincing evidence. Inquiry Concerning a Judge Davey, 645 So.2d 398, 404 (Fla. 1994).

ARGUMENT

I. THE JUDICIAL QUALIFICATIONS COMMISSION (J.Q.C.) EXCEEDED ITS JURISDICTION BECAUSE THE MATTERS THAT THEY INVESTIGATED WERE A JUDGE'S INTERPRETATION AND RULING ON THE LAW, NOT A JUDGE'S CONDUCT. IN SO DOING THE J.Q.C. IS ATTEMPTING TO EVALUATE A JUDGE'S LEGAL ANALYSIS AND OVERTURNING THE DOCTRINE OF JUDICIAL INDEPENDENCE.

"Generally, appellate judges are free to write almost anything in their opinions regarding the decision of the case or the facts and law involved in the case. However, the discussion must be germane to the case at bar and the facts that are within the record of the case." Inquiry Concerning a Judge: Michael E. Allen, 998 So.2d 557 at 565 (Fla. 2008).

This principle applies not only to appellate judges but to rulings made by trial judges. See the oral argument before the Florida Supreme Court on December 2, 2008 in In Re Allen, *supra*, where at 13 minutes 20 seconds Justice Quince said, "County Court judges on a normal basis don't write opinions but what they say orally is the equivalent of their opinion ...," and at 32 minutes 15 seconds Justice Wells stated, "The fact that it is in a judicial opinion does make it a different species because of the chilling effect that the J.Q.C. evaluation of a judicial opinion could have on the judicial process." And at 35:00

Justice Pariente stated, "It seems to me ... if there is going to be the potential for an inquiry as to what is in a written opinion there ought to be a threshold by which this Court ought to be able to make a decision ... to allow the J.Q.C. to go behind the wall of confidentiality that is involved with the deliberative process of the Court." And at 27 minutes ten seconds the attorney for the J.Q.C., Wallace Pope, said "The J.Q.C. would never try to go and evaluate a judge's legal analysis in coming to an opinion."

Every action taken, or ruling made on the law by Judge Eriksson was germane to the case and within the facts and record.

The J.Q.C. should be estopped from bringing this matter before the Court based upon the above quoted statement by their counsel, Wallace Pope. This Court recently stated in the Allen case, *supra*, at 565 that "we caution that our opinion today should not be viewed as a license for the J.Q.C. to judge and evaluate judicial opinions."

II. THE HEARING PANEL ERRED, BOTH PROCEDURALLY AND SUBSTANTIVELY, IN ADMITTING INTO EVIDENCE AND CONSIDERING MATTERS AND TESTIMONY THAT ARE PRECLUDED BY THE FLORIDA CONSTITUTION, JUDICIAL QUALIFICATIONS RULES AND THE FLORIDA STATUTES.

The hearing panel of the Judicial Qualifications Commission violated Art. V, § 12, Fla. Const. and Fla. Jud. Qual. Comm'n R. 12 and 14.

Article V, § 12(a)(4), Fla. Const. states: "Until formal charges against a justice or judge are filed by the investigative panel with the clerk of the supreme court of Florida all proceedings by or before the commission shall be confidential; provided, however, upon a finding of probable cause and the filing by the investigative panel with said clerk of such formal charges against a justice or judge such charges and all further proceedings before the commission shall be public." This section of the Florida Constitution specifies only what becomes public (such formal charges) and indicates when (all further proceedings). The plain language of this section means that all matters before the investigative panel are to remain confidential, except any formal charges that they may file. Furthermore, and by way of limitation, Article V, § 12(b), Fla. Const. specifies that there is to be a separate investigative panel and a separate hearing panel. The hearing panel is vested with the authority to receive and hear formal charges from the investigative panel. Here, the plain language is specified; *i.e.* to receive formal charges. If the people of the state of Florida had wanted any further matters to pass

between the two panels they would have so specified in the Florida Constitution.

Furthermore, Article V, § 12(f)(2)e, Fla. Const. states that "The commission shall hire separate staff for each panel." To allow legal counsel employed by the investigative panel to appear and represent the J.Q.C. before the hearing panel violates this provision because said counsel was present at all meetings, and privy to all matters, that the investigative panel considered. This violates the constitutional mandate of separation of panels. Trial counsel representing the J.Q.C. before the hearing panel should receive a copy of the formal charges and nothing else from the investigative panel. Unlike the other arm of the court, the grand jury, neither the constitution nor the J.Q.C. rules specify that counsel or anything else should pass between the two, and so when the trial counsel for the J.Q.C. uses information obtained during the investigative panel he is revealing, through usage, matters before the investigative panel that are deemed confidential.

Fla. Jud. Qual. Comm'n R. 10(a) specifies that the Notice of Formal Charges and all subsequent proceedings before the hearing panel shall be public. In enacting these court rules the Florida Supreme Court obviously gave restriction to investigative panel matters and records and specified very

clearly that the only things that can be made public are the Notice of Formal Charges and all subsequent proceedings before the hearing panel. The rule speaks very clearly to the topic (Notice of Formal Charges) and time (all subsequent proceedings). The rules governing the J.Q.C. are set by the Florida Supreme Court and can not be violated or circumvented at the whim or pleasure of either the investigative panel or the hearing panel. The investigative panel erred when it revealed or disclosed anything other than the Notice of Formal Charges, and the hearing panel erred when it considered any material, statement or transcript that arose out of the Investigative Panel. Fla. Jud. Qual. Comm'n R. 14 requires that legal evidence be used by the hearing panel, and the use by the hearing panel of matters from the investigative panel (other than the Notice of Formal Charges) violates Rule 14 that governs the Commission as a whole. Such conduct should not be allowed. Such conduct constitutes error and this Court must reject the Findings of the Commission as they were based in whole, or significant part, upon evidence that does not meet the test of legal evidence.

Fla. Jud. Qual. Comm'n R. 12 states:

(a) In all proceedings before the hearing panel, the Florida Rules of Civil Procedure shall be applicable except

where inappropriate or as otherwise provided by these rules.

Fla. Jud. Qual. Comm'n R. 14, entitled "Evidence," states:

At a hearing before the hearing panel, legal evidence only shall be received and oral evidence shall be taken only on oath or affirmation.

Chapter 90.103 of the Florida Evidence Code, entitled "Scope; applicability," states:

(2) This act shall apply to criminal proceedings related to crimes committed after the effective date of this code and to civil actions and all other proceedings pending on or brought after October 1, 1981. (emphasis supplied).

Chapter 90.408 of the Florida Evidence Code, entitled "Compromise and Offers to Compromise," states:

Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise is inadmissible to prove liability or absence of liability for the claim or its value.

Fla. R. Jud. Admin. 2.420 states:

(b) Definitions.

(1) "Records of the judicial branch are all records, regardless of physical form, characteristics, or means of transmission, made or received in connection with the

transaction of official business by any judicial branch entity ..."

(2) "Judicial branch" means the judicial branch of government, which includes the state courts system, the clerk of court when acting as an arm of the court, the Florida Bar, the Florida Board of Bar Examiners, the Judicial Qualifications Commission, and all other entities established by or operating under the authority of the supreme court or the chief justice.

(c) Exemptions. The following records of the judicial branch shall be confidential:

(8) All records presently deemed to be confidential by court rule, including the Rules for Admission to the Bar, by Florida Statutes, by prior case law of the State of Florida and by the Rules of the Judicial Qualifications Commission.

Fla. Jud. Qual. Comm'n R. 10, entitled "Filing," states:

(a) Upon the filing of the Notice of Formal Charges against a judge with the Clerk of the Supreme Court of Florida, the Notice of Formal Charges and all subsequent proceedings before the hearing panel shall be public.

Judge Eriksson made a Motion in Limine to exclude from the hearing panel of this cause any testimony or statement made to the Judicial Qualifications Commission investigative panel on the grounds that 1) all matters before that panel are

confidential under Fla. Jud. Qual. Comm'n R. 10(a), and 2) the use of any testimony or statement violates section 90.408 of the Florida Evidence Code. The chair of the hearing panel and the hearing panel each heard the Motion in Limine and denied it, thereby allowing into evidence at the hearing matters stated by Judge Eriksson before the investigative panel. Said matters were referred to by the hearing panel (although taken out of context and misconstrued) as the basis for the Commission's findings.

In support of this argument Judge Eriksson would show that the plain meaning of Fla. Jud. Qual. Comm'n R. 6(b), "The judge has no right to be present nor to be heard during an investigation," means that the matters received by the investigative panel are confidential and remain so.

Furthermore, Section 90.408 of the Florida Evidence Code governs a judge's participation before the investigative panel and deems inadmissible any statement made by a judge to the investigative panel. For this evidentiary statute to apply there must be a controversy in effect at the time of any settlement discussions. The existence of an actual lawsuit is not necessary. As Professor Ehrhardt so succinctly stated "However, under Section 90.408, any conduct or statements made during the negotiation are inadmissible when offered to prove

liability. The admissibility of admissions of fact made during the compromise negotiations would inhibit freedom of communication with respect to compromise and would serve as a trap to the unwary." Florida Evidence, 2002 Edition, by Charles W. Ehrhardt, at page 263.

In the present case there was a controversy (see Notice of Investigation) and the judge was given, pursuant to Fla. Jud. Qual. Comm'n R. 6(b), notice of the time and place of a meeting to discuss the subject matter of the notice and an invitation to meet and discuss the matter. The investigative panel has the right to settle or compromise the matter because it has the right to meet with the judge on an informal basis [Rule 6(c)], determine that the complaint is unfounded or merits no further action by the commission [Rule 6(d)], or reach an agreement with the judge on the complaint [Rule 6(j)]. This is shown by the comments of Second District Court of Appeal Judge Morris Silberman on page 3 of the September 15, 2007 edition of the Florida Bar News where he is quoted as saying: "There are cases that are resolved with a private discussion with the judge. Those are not public." In this case Judge Morris Silberman presided over the investigative panel that filed the charges against Judge Eriksson. In sum, it is improper to admit any such material, whether it be a statement, or written material,

and there is certainly no policy reason to allow it. For this court to differ would put more than a chilling effect upon any judge's decision to appear before an investigative panel. It would freeze the purpose of Rules 6(b), 6(c) and 6(j) and render those provisions virtually useless. It would severely hamper the ability of the J.Q.C. to do its job, as the private discussions referred to above by Judge Silberman would probably be declined by any judge so invited.

The remedy is to strike all matters inadmissibly presented to the hearing panel and either find insufficient proof was presented to sustain the hearing panel's findings, or send the matter back to the hearing panel for a new hearing consistent with the law.

III. IN COUNT I THE EVIDENCE AND LAW DOES NOT SUPPORT THE HEARING PANEL'S FINDINGS OR CONCLUSIONS, AS IT ATTEMPTS TO FIND THAT JUDGE ERIKSSON WAS MOTIVATED BY ILL WILL, WHEN THE EVIDENCE WAS NOT ONLY THE OPPOSITE BUT THAT HIS ACTIONS WERE PROPER AND WITHIN HIS DISCRETION.

The findings of the investigative panel exceed the authority of the J.Q.C. because said findings do not reflect that the judge 1) willfully or persistently failed to perform judicial duties, or 2) engaged in conduct unbecoming a member of the judiciary that demonstrated an unfitness to hold office, or

3) has a permanent disability that prevents him from performing judicial duties.

In this case it's not a question of the judge's conduct, but rather it's a question of whether the judge followed and applied the law as the judge interpreted it. If this judge, or any other judge, misinterpreted or misapplied the law the remedy for such ruling is an appeal, not an investigation by the J.Q.C. If the J.Q.C. can look into a judge's rulings, then judges in all courts of this state would be loathe to make tough decisions, or would reflect long and hard before making said decision or would require a law clerk to research every decision. This would be an impediment to a judge's ability to do their job. In reality, a judge must make many rulings everyday and take into consideration the judge's education in the law, experience with the law, research on the law, discussions with other judges, and arguments presented in court. In this case Judge Eriksson made his rulings and applied the law based upon his understanding of the law.

In Count I of the Findings the J.Q.C. made a finding that Judge Eriksson revoked Robert Walton's bond because of animosity toward Mr. Walton's lawyer and in an effort to punish Mr. Walton. There was no testimony presented that Judge Eriksson had any animosity toward Mr. Walton's attorney, and the

interpretation by the Commission that his bond was revoked to punish him for asking the judge to recuse himself is inaccurate and mistaken.

To understand the judge's action when presented with the oral request to recuse, one must understand the law that the judge was aware of, and the facts that existed, at that time.

In 2007 the judge was aware of, and being guided by, Fla. R. Jud. Admin. 2.250(a)(1)(A) that recognizes that some cases may have complexity, but most cases should be completed within certain time standards, and specifies that a misdemeanor should be completed within 90 days from arrest to final disposition.

Further, Fla. R. Jud. Admin. 2.545, entitled case management states:

(a) Purpose. Judges and lawyers have a professional obligation to conclude litigation as soon as it is reasonably and justly possible to do so. However, parties and counsel shall be afforded a reasonable time to prepare and present their case.

(b) Case Control. The trial judge shall take charge of all cases at an early stage in the litigation and shall control the progress of the case thereafter until the case is determined. The trial judge shall take specific steps to monitor and control the pace of litigation, including the

following.

(1) Assuming early and continuous control of the court calendar ....

(5) Developing rational and effective trial setting policies.

(e) Continuances. All judges shall apply a firm continuance policy. Continuances should be few, good cause should be required, and all requests should be heard and resolved by the judge.

Judge Eriksson was not only aware of the above rules promulgated by the Florida Supreme Court, but the Chief Judge of the Eighteenth Judicial Circuit had specifically adopted them into the operating procedure for the County Court in Seminole County Florida.

With the above procedural law in mind the record shows that prior to March 2007, when Mr. Walton's bond was revoked and new bail set, the following had occurred:

1. Mr. Walton had been arrested on May 9, 2006 and charged with possession of cocaine and driving under the influence.

2. His attorney, Kendall Horween, applied for, and received discovery on July 14, 2006, and learned that the state's case was one witness (the arresting officer), and that almost the entire incident was captured on an in-car camera.

3. Mr. Horween had interviewed the arresting officer at a Department of Highway Safety and Motor Vehicle hearing in August, 2006.

4. Between July 2006 and February 2007 Mr. Walton's attorney, Kendall Horween, attended five pre trial conferences in court.

5. On October 5, 2007, the state attorney dropped the cocaine charge, leaving Mr. Walton with driving under the influence and a related traffic charge.

6. On January 23, 2007, Mr. Walton's attorney, Kendall Horween, announced at a pre trial conference that the case was ready for trial and it was given a trial date of February 19, 2007.

7. On February 8, 2007, Mr. Horween asked for a continuance of the trial, citing as a reason that the attorneys needed to redact some of the video of the traffic stop and roadside field sobriety exercises. Since the attorneys announced that they agreed upon what was to come out of the video the motion to continue was denied. Mr. Horween also professed that he may not be prepared for trial. Judge Eriksson noted from the file that Mr. Horween had made five court appearances in the case, that he had interviewed the arresting officer at a Department of Highway Safety and Motor Vehicle

hearing, that he had the video of the case and that Mr. Horween was an experienced attorney. The case was nine months old and basically consisted of an arresting officer who recorded virtually the whole case on an in-car camera. Keeping in mind the case management time standards and the continuance policy in the Rules of Judicial Administration, the fact that it was a one witness case and that Mr. Horween was an experienced attorney, the judge denied the continuance. At the time of trial on February 19, 2007, Mr. Horween again requested a continuance, citing as the reason that after months he (and the prosecutor) had not prepared the evidence. After the judge denied the motion and tried to begin jury selection, Mr. Walton and Mr. Horween had a private conversation. Mr. Horween then verbally asked the judge to recuse himself, citing as a reason that the judge could not be fair. The only thing that the judge had done was made a judicial ruling (denied a motion to continue) and such a ground is not a legal basis for a recusal. Believing that any jury selection that followed might be tainted, the judge continued the case. Believing that Mr. Walton's recusal motion was only for the purpose of delay, Judge Eriksson was of the opinion that there had been a breach of the bond and revoked the bond as the defendant's action appeared intended to undermine the integrity of the judicial system. Judge Eriksson

then set a new bond; one that was not punitive, but what he believed was the minimal bond allowed by law at that point; that is, at least double the original amount and not less than $2,000. Florida Statute § 903.046(2)(d). Judge Eriksson misread the original bond of 3,500 as $5,000 and set new bail at $10,000. He believed that the oral motion to recuse was not made in good faith, was solely to obtain a continuance (the only day in Seminole County that a jury is picked is Monday) and that it interrupted the proper administration of justice. Unlike in Judge Michael Allen's case, Inquiry Concerning a Judge; Michael E. Allen, 998 So.2d 557, there is no evidence that Judge Eriksson had any ill will or animosity toward Mr. Walton or his attorney. By interrupting the proper administration of justice there is a breach of the bond. At the time Judge Eriksson was aware of Thomas v. State, (Seminole County Case #05-CA-1317-16H-L, Fla. 18th Cir. Ct. June 30, 2005), a case where a trial judge revoked a bond and remanded a defendant into custody. In the denial of the petition for a writ of habeas corpus Circuit Judge O. H. Eaton, Jr. wrote: "it is apparent that Judge Marblestone was of the opinion that the defendant was interfering with the orderly process of the court's docket by changing his mind. This Court will not substitute its judgment for the judgment of the trial court who obviously found 'good cause' to believe the

defendant would not abide by the further orders of the Court." This opinion clearly would lead Judge Eriksson, or any other judge, to believe that interference with a court's docket to avoid a trial is a matter for a trial court's judgment, and is a basis to revoke a bond and set new bail.

Likewise, Judge Eriksson was aware of Bradshaw v. State, Case #06-37AP, Fla. 18th Cir. Ct. May 16, 2006, a case where a bond was revoked and new bail set. Circuit Judge Debra Nelson, in denying a petition for a writ of habeas corpus, wrote: "The record indicates that Judge Eriksson was of the opinion that the Petitioner was interfering with the orderly process of the Court's docket by changing his mind at that phase of the proceedings. This Court will not substitute its judgment for the judgment of the trial court who obviously found 'good cause' to believe the Petitioner would not abide by the further orders of the Court." Further, the Fourth District Court of Appeal recognized this kind of situation and in Paul v. Jennie, 728 So.2d 1167 at 1170 (Fla. 4th DCA 1999), wrote: "The 1983 amendment modified the existing language and additionally authorized a court to detain a person 'if no conditions of release can ... assure the integrity of the judicial process.'" See also Fla. R. Crim. P. 3.131(e), (f) and (g).

The hearing panel heard only an opinion by Kendall Horween

& Jeffrey Wiener and was cited to no case law or statute that indicated that Judge Eriksson's actions violated a statute or case law. The hearing panel heard Judge Eriksson's stated reason for the ruling that he made, and further the panel heard from retired Circuit Judge C. Vernon Mize, Jr., current Circuit Judge O. H. Eaton, Jr. and current County Judge Donald L. Marblestone (Judge Eriksson's mentor judge). All testified that they believed the judge was within his authority to revoke the bond. If reasonable minds can differ then the judge's ruling was within his discretion and said action is not within the jurisdiction of the J.Q.C. Any remedy would be in the nature of an appeal or to seek a writ of habeas corpus, and neither was done in this case. Furthermore, on this evidence the standard of clear and convincing evidence is not met. It's not a question of the judge's conduct, but of the judge's interpretation and ruling on the law.

It should be pointed out that in the case of Inquiry Concerning Judge John R. Sloop, 946 So.2d 1046 (Fla. 2006), the grievous conduct of Judge Sloop was not that he had revoked bond and issued warrants but when the impropriety of doing so in that circumstance was pointed out to him by Judge Eriksson, Judge Sloop failed to take immediate steps to remediate his prior conduct. In Judge Eriksson's case he tried to do as he believed

the law required in Fla. Stat. § 903.046(2)(d) and set new bail at what he believed was the minimum amount allowed by law.

IV. IN COUNT III THE EVIDENCE AND LAW DOES NOT SUPPORT THE HEARING PANEL'S FINDINGS OR CONCLUSIONS. IT ATTEMPTS TO OVERTURN THE DOCTRINE OF JUDICIAL INDEPENDENCE BY REPLACING PROCEDURAL CASE LAW WITH PROCEDURAL STATUTORY LAW, AND THIS CAN NOT BE DONE BECAUSE PROCEDURE IS A MATTER TO BE DETERMINED BY THE COURT, NOT THE LEGISLATURE.

As to the Findings and Conclusions of the hearing panel concerning Count III, the Injunction Hearings, the hearing panel of the J.Q.C. erred as both a matter of law and a matter of fact when it rendered a decision that Judge Eriksson violated a judicial canon.

As to the J.Q.C.'s decision it appears as though they claim that the Florida Statutes and Rules of Family Procedure lay out a procedure that the judge is to follow when presiding over a case involving a Petition for an Injunction against Domestic Violence, Repeat Violence or Dating Violence. The J.Q.C. determined that § 741.30, Fla. Stat. somehow requires that the judge assist the petitioner in presenting their case, yet the Commission, at page 18, states: "Section 741.30(c) requires that the Clerk of the Court assist any petitioner in seeking an injunction."

The J.Q.C.'s above mentioned belief completely overlooks the mandate by the Florida Supreme Court in a series of cases known as "Family Courts II and Family Courts III" that clearly designates how these cases are to be handled. When the Florida Legislature enacted the statutes that created a cause of action for an Injunction for Protection against Domestic Violence and an Injunction for Protection against Repeat Violence they did specify that a party did not need to be represented by an attorney at the trial on the petition. However, they did not specify that the judge was supposed to assist the petitioner at the trial. The statute is silent as to that, and this seems to be the gravamen of the J.Q.C.'s complaint and is the basis for the J.Q.C.'s error in this case.

The Florida Supreme Court's guidance in the injunction area began with the case commonly called "Family Courts II" and is In Re Report of the Commission on Family Courts, 633 So.2d 14 (Fla. 1994). In speaking to this issue the court said, at page 17, "each circuit must be staffed to screen, evaluate, and manage the above described cases through the justice system to a satisfactory conclusion. A case management staff must be available to help and direct families at the point of initial contact with the judicial system to the appropriate judge, and/or to the appropriate judicial or community-based services."

Following "Family Courts II" was the case commonly called "Family Courts III" and is In Re Report of the Family Court Steering Committee, 794 So.2d 518 (Fla. 2001). In "Family Courts III" the Florida Supreme Court adopted guiding principles and stated, at page 524, "These guiding principles do not rule out adversary litigation. The Committee recognizes that the adversary system is sometimes essential to resolve sincere differences of opinion, to balance power in relationships, and to enforce orders on recalcitrant parties." On that same page they go on to say, "We emphasize that our endorsement of these guiding principles in no way changes our view that the primary role of the judge is to enforce and uphold the rule of law." On page 526 of that opinion is Recommendation #3 that has as its third essential element that there be Self Help Programs that provide intake, screening and procedural guidance to self represented litigants in family law cases. In conjunction with this is Recommendation #4(b) concerning Intake and Referral and specifies that "The Florida Supreme Court should require each circuit to establish an intake process to provide information, make referrals to legal or social services, and assist self-represented litigants." To further clarify this point and to specify the judge's role the Court stated, at page 529, "Under this model, the judge's role of performing these non judicial

duties and providing continuity to the family is shifted to a staff member or team of staff. Thus, judges should be able to conserve their time and energy for 'what judges do best - resolve issues properly determined by the adversary process and fashioning appropriate remedies.'"

Through "Family Courts II" and "Family Courts III" the Florida Supreme Court has specified how these types of cases are to be handled. In so doing they have put procedural life into this area of law. The legislature may only provide substantive law, not procedural law.

This points out the friction between the substantive law and the procedural law and as such it is not a proper subject of inquiry for the J.Q.C., as they are not finding fault with the conduct of the judge, but with the judge's opinion on how to administer the law.

The J.Q.C.'s findings are not supported by case law. In the dissolution of marriage case of Paulson v. Evander, 633 So.2d 540 (Fla. 5th DCA 1994), the wife was *pro se*, and to assist her the trial judge provided legal counsel and advice to the wife by amending and redrafting pleadings for the wife. In granting a writ of prohibition preventing the trial judge from further exercising jurisdiction in the matter the Fifth District Court of Appeal stated, at 540,

> "It should be noted at the outset that both of the parties are acting *pro se*, but that the former husband has an advantage in that he is a lawyer while the former wife is not. Still, a court must maintain its obligation to uphold the independence and impartiality of the judiciary. Fla. Code Jud. Conduct, Canon 1 and 2A. A court can be tempted to make suggestions to *pro se* litigants in order to move cases along in compliance with the time standards imposed upon them by the Florida Rules of Judicial Administration. However, our system of justice precludes participation by the court and imposes upon it the duty of ruling on those matters brought before it without participating in the redrafting of pleadings to state a cause of action. We reject, however, any attempt by Paulson, *supra*, to suggest that a court cannot explain the basis for a ruling whether or not this may indirectly assist a litigant when preparing an amended pleading.
>
> In Leigh v. Smith, 503 So.2d 989 (Fla. 5th DCA 1987), this court ruled that a signal from a judge which is designed to alert a party to make a motion or raise an objection is sufficient, by itself, to warrant disqualification. The amendment of pleadings on the court's own motion to withstand an opponent's motion to dismiss is similarly sufficient."

The clear meaning of the Paulson case, *supra*, is that we don't look at the quantity of help that a judge gives, or the quality, but whether the court gave either party any help at all. This is what Judge Eriksson was trying to do.

In Ohrn v. Wright, 963 So.2d 298 (Fla. 5th DCA 2007), the trial judge entered an injunction without swearing either witness and did not permit the respondent to call a witness. In reversing the final judgment because of a denial of fundamental due process the Fifth District Court of Appeal stated: "While we

are sympathetic to the time constraints faced by busy trial courts, we cannot ignore the dictates of the Florida Statutes or the requirements of fundamental due process concerning the procedures to be utilized in making critical decisions of this nature." They cite Lewis v. Lewis, 689 So.2d 1271 (Fla. 1st DCA 1997). In Lewis, *supra*, the trial court granted both the husband's and the wife's petitions for protection against each other without taking any testimony. In reversing the trial judge, because of a denial of fundamental due process, the First District Court of Appeal said, at 1273, "In regard to permanent injunctions in domestic violence cases, such as the one at issue in the instant case, Rule 12.610(c)(1)(B), Florida Family Law Rules of Procedure, contains one plain unambiguous sentence: A full evidentiary hearing shall be conducted." See also Utley v. Baez-Camacho, 743 So.2d 613 (Fla. 5th DCA 1999).

When the case law says the trial judge is to conduct an evidentiary hearing it is believed that this means to use the Florida Evidence Code. The J.Q.C.'s findings somehow seem to ignore the Code and suggest that the legislation that created the causes of action at issue here (Injunctions for Protection) somehow indicate that a judge should ignore the Code.

Judge Eriksson suggests that three very important Code provisions apply to these proceedings. The first is §

90.612(1), Fla. Stat., which states: The judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence, so as to:

(a) Facilitate, through effective interrogation and presentation, the discovery of the truth.

(b) Avoid needless consumption of time.

The second pertinent Evidence Code provision is § 90.802, Fla. Stat., which very clearly and succinctly states: "Except as provided by statute, hearsay evidence is inadmissible."

Florida Statute § 90.104(3) states "Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights, even though such errors were not brought to the attention of the trial judge."

Judge Eriksson, as all trial judges must do in these situations, was trying to apply the two principles of law in conducting these hearings. The J.Q.C. seems to believe § 741.30(1)(g), Fla. Stat., controls the hearing, whereas Judge Eriksson believes that the above just cited statute controls. The J.Q.C.'s findings that Judge Eriksson excluded all parties from the courtroom is untrue and was not supported by the evidence. Judge Eriksson did not on this occasion, or on any other occasion, ever close his courtroom or indicate that participants should remain outside. The evidence on the video

shows differently and does not support the conjecture on the part of the Commission.

The evidence does not support that Judge Eriksson used a "rigid and formulaic method" during the proceedings. What the evidence shows was that as each case was called he was looking in the file and reviewing the factual allegations in the petition. That is why Judge Eriksson was asking the petitioner to call their witness, *i.e.* the person who could testify directly about the event and not provide hearsay. Query: What would be more frustrating than for a petitioner to provide only their own testimony, and it be nothing but hearsay, and have their petition denied. Would this promote the public confidence in the judiciary even though it was a correct ruling? So what the judge was trying to do was exercise reasonable control over the proceedings. Florida Statute § 90.612(1). To conduct the trial otherwise would have caused the judge to depart from his role as a cold, impartial and neutral judge. See In Re McMillan, 797 So.2d 2001 (Fla. 2001) at page 571, where the Florida Supreme Court enunciated and reiterated the legal standard that is to guide a judge in these proceedings, thusly:

> "This Court has declared from time immemorial that the lack of bias and partiality is an essential prerequisite to service as a judicial officer. The promise of 'Equal Justice Under Law' is essentially predicated upon an independent judiciary committed to fairness and justice in the application of the law to

> the facts of each individual case. In Rose v. State, 601 So.2d 1181 (Fla. 1992), we affirmed this long established and oft-repeated principle in our jurisprudence: The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:
>
> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge .... The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> ... The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this. State *ex rel.* Davis v. Parks, 194 So. 613, 615 (Fla. 1939). *Id.* at 1183. Accordingly, no other principle is more essential to the fair administration of justice than the impartiality of the presiding judge."

Further, in State *ex rel.* Davis v. Parks, *supra*, at page 615, the Florida Supreme Court went on to explain the neutrality and said, "This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right ...."

If this Court were to accept the J.Q.C.'s version of what a judge is to do in assisting a petitioner, then logic would dictate that a judge do the same with the respondent. As is the case with so many injunction cases the respondent is, or may be, facing a criminal charge. Is the judge supposed to ask the

respondent if they want to testify and if so should the judge caution the person that anything they say could be used against them in a criminal trial? What would put a more chilling effect on a respondent than the judge so advising the person? For the judge to give either party any assistance would be improper. If the Florida Supreme Court wanted a judge to assist the parties they would have so stated in Family Courts III, but instead they specified that this was a matter for the court clerks and case managers.

There are only two instances where the Florida Supreme Court has specified that a trial judge is to instruct and assist the parties. The instances are in non-criminal traffic infraction hearings [Fla. R. Traf. Ct. 6.450(b)] and in small claims court [Fla. Sm. Cl. R. 7.140(e)]. If the Court had meant otherwise they would have so provided. Instead, the Court was silent. See Fla. Fam. L. R. P. 12.610(c)(1)(B). The only mention is in the Order Setting Hearing on the petition and in that notice it says "All witnesses and evidence, if any, must be presented at this time." See Fla. Fam. L. R. P. 12.980(b)(1).

The hearing panel received no testimony that Judge Eriksson's conduct throughout the injunction hearings was improper. What the hearing panel heard was testimony from members of the judiciary and practicing attorneys that Judge

Eriksson's conduct was proper.

In summary, Judge Eriksson was attempting to apply the law as he believed it to be just as Circuit Judge Kerry Evander attempted to do in Paulson v. Evander, 633 So.2d 540 (Fla. 5th DCA 1994), Circuit Judge Alice Blackwell White attempted to do in Ohrn v. Wright, *supra*, Circuit Judge George Reynolds III attempted to do in Lewis v. Lewis, *supra*, and Circuit Judge George Sprinkle attempted to do in Utley v. Baez-Camacho, *supra*. As demonstrated in those cases, where several of the parties were *pro se*, the proper remedy for Judge Eriksson's ruling would be a review by an appellate court, not by the J.Q.C. In this way the J.Q.C. has exceeded its jurisdiction.

There being a clear dispute between the statutes and case law, the findings of the J.Q.C. must be rejected. A judge's opinion on what the law is does not fall under the scope of matters to be considered by the J.Q.C.

V. REPLY TO COMMENTS AND DISCUSSION IN THE J.Q.C.'S FINDINGS AND RECOMMENDATIONS.

Judge Eriksson responds to several matters in the J.Q.C.'s Findings, Conclusions and Recommendations as follows:

1. On page 7 appears the words "he conceded he had changed his own views on how he should have treated the unrepresented petitioners." This should not be construed as an agreement with

the Commission, but only as a statement that until this matter is ultimately determined the better practice is to do as the J.Q.C. suggests thereby avoiding a Rule 6(b) Notice of Investigation from the J.Q.C.

2. On page 11 the Commission incorrectly summarized the evidence about redaction of the video because the video of Mr. Walton's proceedings from February 8, 2007, showed Mr. Walton's attorney, Kendall Horween, telling the court that the parties agreed on the redaction of the video. Furthermore on page 11 the Commission mentioned that Judge Eriksson did not believe Mr. Horween was being candid with the court when he said he was not sufficiently familiar with the case to proceed to trial. The exhibits introduced, and the testimony before the Commission of Kendall Horween show that Mr. Horween had been the only one from his office to ever appear in court in this case (six times) and that Mr. Horween on January 23, 2007, personally told the court to set the case for trial. In his testimony before the hearing panel Mr. Horween stated he did not recall attending a Department of Highway Safety and Motor Vehicle hearing. After a recording of that appearance (which included an extensive interview of the arresting officer) was played, Mr. Horween admitted he had appeared and conducted that interview. The Commission somehow seems to believe a video must be reviewed or

redacted before a trial. If there is objectionable material, as with all evidence, a party either moves in limine pre-trial or they waive it, subject to a relevancy objection at trial, or have faith that the prosecutor will adhere to their ethical obligation and not attempt to introduce irrelevant or prejudicial material. Failure on Mr. Horween's part, after seven months, is not the good cause for a continuance that (then) Fla. R. Jud. Admin. 2.085(d) called for.

3. On page 12 the Commission fails to point out that Judge Eriksson was applying what he believed Thomas v. State, *supra*, Bradshaw v. State, *supra*, and Fla. R. Crim. P. 3.131 allowed, and further fails to point out that in setting the new bail he was trying to set the minimum required by § 903.046(1)(d), Fla. Stat.

4. On page 14 the Commission fails to point out that in disqualifying himself, Judge Eriksson did so not because of the merits of the motion but because when he'd attended the new judge's college in 1995, Second District Court of Appeal Judge Carolyn Fulmer's instruction was that if the case drew undue media attention and it was because a litigant simply claimed that a judge could not be fair to the litigant, then the best thing to do was to remove yourself from the case. Remember, when Judge Eriksson was presented with the motion to recuse, at

that moment he knew that the only thing he had done was a denial of a motion to continue. Since jurors in Seminole County are called in on Mondays only for the purpose of jury selections (and not Tuesdays as the Commission believes) it was reasonable for Judge Eriksson to believe that Mr. Walton's action was simply for a delay and was inappropriately interrupting the orderly administration of justice, thereby breaching his bond. Furthermore, the Commission fails to show why Judge Eriksson would not take such action again. It is not because of a belief that it was error, but because it was apparent from the tenor of the Commission that it would bring a Rule 6(b) Notice of Investigation. Finally, on page 14, Judge Eriksson did not make an error of law in setting the new bail, but simply misread the existing bail amount. If anything, the setting of the new bail shows good faith on the part of Judge Eriksson in attempting to set the minimum bail allowed by statute and vitiates any conclusion by the Commission that Judge Eriksson's actions were intended to be vindictive or punitive.

5. As to the Commission's Finding in Count III on the Injunction Hearings the Commission mentions that the New Judge's College addresses the subject of domestic violence. Judge Eriksson disputes that there was any instruction on any procedural rules by which said hearings are to be held. The

record in this case is devoid of any such evidence and Judge Eriksson's review of his materials from the New Judge's College fails to mention any such instruction. To the extent that the Commission feels that a "political" dispute existed in this case, Judge Eriksson asserts that he spoke with the staff of the Office of the State Courts Administrator and after they reviewed the administrative orders that were in place in Seminole County they determined that the administrative order "completely dismantled the Family Courts concept" intended by the Florida Supreme Court and that the trial judge could not assist the parties. Furthermore, when Judge Eriksson spoke with Justice Pariente and provided her with copies of Seminole County's Administrative Order and explained what our county was doing, Justice Pariente agreed with Judge Eriksson that the trial judge could not help the petitioner.

The Commission's comments about Judge Eriksson's concerns that these cases should not have been permanently transferred to the County Court were not without foundation because staff at the Office of the State Courts Administrator and Justice Pariente had both told him that the cases should not be, and further that under the cases of Crusoe v. Rowls, 472 So.2d 1163 (Fla. 1985) and Wild v. Dozier, 672 So.2d 16 (Fla. 1996), the county court was without jurisdiction to handle such a case.

For Judge Eriksson to question if any county judge could validly enter an injunction, after being told he could not, and having read and extensively discussed the Crusoe case with his fellow county judges is not something to find fault with him for, but to commend him for.

6. On page 20 of the Commission's findings the Commission says that only the petitioner and respondent were present in the courtroom and that none of the other petitioners and respondents were able to watch what occurred during the prior cases. This conclusion is incorrect. Judge Eriksson has never closed the courtroom during an injunction hearing (or any other hearing for that matter) and the video shows that others were seated in the audience and later participants even referred to prior cases that day.

The panel goes on to criticize Judge Eriksson for not giving a preliminary explanation before the hearings, on the danger of self-representation or that they could seek counsel. As is pointed out in Family Courts III, *supra*, this assistance is what the clerk of the court and the case managers are required to do. The failure of the court system in Seminole County to have case managers has long been known, the county judges have frequently told the chief judge of this deficiency, and pointed out that they did not believe it to be their proper

role to give legal advice. In fact, at the Hearing Panel, County Judge Jerri Collins testified that she is on a statewide committee with other judges and staff from the Office of the State Courts Administrator with a goal of producing a video for participants in injunction hearings to advise them what to do and how to do it.

The Commission seems to deem it important that there was a sworn petition in the court files. It is a requirement of law that the petition be sworn before it is filed, but thereafter it has no legal significance. The petition is not evidence and can only be used for the consideration of a temporary injunction which was not the purpose of the court proceedings on the day at issue. All of the hearings on the day considered in this case were for final judgments. The reason Judge Eriksson asked petitioners on the day of the hearings about who advised them to file a petition was so he could ask the chief judge to relay to the specific agencies that made the suggestion about filing a petition to also advise the people in the future on how to handle their case in court.

7. On page 21 the Commission puts quotes around "Acting Circuit Judge" in remarking how the Order of Dismissal was signed. No such quotes exist on any Order of Dismissal. Judge Eriksson, and all the other county judges, sign as acting

circuit judges because as a county judge they do not have jurisdiction over a Petition for an Injunction. Jurisdiction lies only in the circuit court. The Commission also remarks that the Order of Dismissal was a fill-in-the-blank. Yes, it was. The order is the form provided by the Florida Supreme Court in Fla. Fam. L. R. P. 12.980(e). The Commission also notes that the judge did not ask the respondent to speak. If the judge had asked the respondent to speak, would the judge have (logically or ethically) needed to caution the respondent that anything said could be used against them? What would create a more chilling effect upon the respondent?

8. On page 22 the Commission puts quotes around the word repeat and somehow disagrees with the denial of the petition. The petition was brought under the repeat violence statute, not the domestic violence statute, and required proof of two separate acts. The denial of the petition was the only lawful result from the evidence presented.

9. On page 23 the Commission surmises that a petitioner had been advised by a prior litigant about court proceedings. Judge Eriksson is unaware if that occurred but disputes the inference that it was a closed courtroom.

10. The Commission takes issue with Judge Eriksson disallowing police reports and sworn petitions as evidence. For

the reasons stated earlier in this reply Judge Eriksson would state the documents are hearsay and not admissible and he was following the law. The Commission even states "Clearly police reports do constitute hearsay." Is the Florida Judicial Qualifications Commission asserting the proposition that they believe that Final Injunctions for Protection, with all the attendant conditions, restrictions and consequences, should be granted when the only evidence is hearsay? On page 25 the Commission seems to recede from this position.

The Commission goes on to comment "that Judge Eriksson was actually reading the sworn petition ...." Yes, reading the petition was often times how the determination was made that the petitioner would be offering hearsay.

11. As to the Commission's finding that Canon 1, 2A, 3B(7) and (8) were violated, the response is that Judge Eriksson was attempting to apply the law as he understood it. A dispute on the applicable law is not a basis for a Judicial Qualifications finding, nor is "difficulty in balancing the interests of the petitioners versus the interests of the respondents" a basis for a Judicial Qualifications Commission finding.

12. The Commission's final paragraph indicates that Judge Eriksson agrees he did wrong. This conclusion is, and was, predicated upon the premise that the law is the way the J.Q.C.

deems it to be. If that is correct, Judge Eriksson unequivocally accepts it. However in line 24 of page T-507 counsel for the J.Q.C., Michael Schneider points out the flaw in the entire proceeding: "Well, you understand that in this arena, whether or not you ruled correctly is of much less import than the perception of impartiality and integrity by the judicial process and by the judicial officer executing that judicial process?" Does public perception override a correct ruling on the law?

RELIEF SOUGHT

Judge Eriksson respects the Canons of Judicial Ethics, respects the purpose of the Judicial Qualifications Commission, but simply disagrees with the Commission's Findings and Conclusions. This Court should find:

1. That the Judicial Qualifications Commission exceeded its jurisdiction in this matter when it attempted to rule on Judge Eriksson's opinions and rulings on the law.

2. That all matters before the investigative panel are confidential, except for any Notice of Formal Charges that may be filed.

3. That § 90.103, Fla. Stat., applies in this case and to Judicial Qualifications Commission proceedings in general.

4. That the standard of clear and convincing evidence has

not been met when reasonable minds differ.

5. That Judge Eriksson's rulings were within his judicial discretion.

Finally, this Court should reject the Findings of the Judicial Qualifications Commission, dismiss the charges against Judge Eriksson and assess costs against the Commission for these Findings and the investigative panel's charges that were unfounded.

Respectfully submitted this 6th day of April, 2009.

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by U.S. Mail delivery this 6th day of April, 2009 to:

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_____
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County Judge

CERTIFICATE OF COMPLIANCE

I CERTIFY that the Brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

_____
Ralph E. Eriksson, pro se
County Judge